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Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Communication No. 51/2013

Decision adopted by the Committee at its sixtieth session (16 February-6 March 2015)

Submitted by:	Y.W. (represented by counsel, Niels-Erik Hansen)
Alleged victim:	The author
State party:	Denmark
Date of communication:	2 January 2013 (initial submission)
References:	Transmitted to the State party on 13 March 2013 (not issued in document form)
Date of adoption of decision:	2 March 2015
Procedural issues:	Lack of substantiation
Subject matter:	Deportation to China
Substantive issues:	Non-refoulement, gender-based violence, access to justice
Articles of the Convention:	1-3, 12 and 15
Articles of the Optional Protocol:	4 (2) (c)

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Annex

Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (sixtieth session)

concerning

Communication No. 51/2013*

Submitted by:	Y.W. (represented by counsel, Niels Erik Hansen)
Alleged victim:	The author
State party:	Denmark
Date of communication:	2 January 2013 (initial submission)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 2 March 2015,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Y.W., a Chinese national born in 1967. She sought asylum in Denmark; her application was rejected and, at the time of submission of the communication, she was awaiting deportation to China. She claims that such deportation would constitute a violation by Denmark of her rights under articles 1 to 3, 12 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women, read in conjunction with the Committee's general recommendation No. 19. The author is represented by counsel, Niels-Erik Hansen. The Convention and the Optional Protocol thereto entered into force for the State party on 21 May 1983 and 22 December 2000, respectively.

1.2 On 20 June 2014, the Committee, acting through the Working Group on Communications under the Optional Protocol, decided, pursuant to rule 66 of its rules of procedure, to examine the admissibility of the communication separately from its merits.

* The following members of the Committee participated in the examination of the present communication: Ayse Feride Acar, Gladys Acosta Vargas, Magalys Arocha Dominguez, Barbara Bailey, Niklas Bruun, Louiza Chalal, Náela Gabr, Hilary Gbedemah, Nahla Haidar, Ruth Halperin-Kaddari, Yoko Hayashi, Lilian Hofmeister, Ismat Jahan, Dalia Leinarte, Lia Nadaraia, Pramila Patten, Silvia Pimentel, Biancamaria Pomeranzi and Patricia Schulz.

Factual background

2.1 The author claims that she was threatened, raped, burned with hot oil and forced into prostitution by criminals in China, without providing dates for those events or further details. Her husband, a passionate gambler, had allegedly borrowed money from them and she had been forced to sign a document making her responsible for repaying the debts. She submits that she could not seek protection from the police in China because gender-based violence is not acknowledged by the authorities as an issue of concern, referring to the concluding comments of the Committee on the sixth periodic report of China.[1]

2.2 The author submits that she fled China before 2006 and travelled in various countries, without providing a precise date of departure from China or arrival in Denmark. She contends that she had to flee the country and seek asylum in Denmark to escape the relentless threats of violence and increasing pressure that she faced in China. She fears that, if she returns to China, the same network of criminals will find her and kill her as revenge or that she will again be raped and sexually exploited until she pays off her husband's debts.

2.3 On 31 May 2010, the author's application for asylum was rejected as manifestly unfounded by the Danish Immigration Service under section 53b (2) of the Aliens Act. The author contends that she was not assigned counsel during the processing of her case and that she had no access to legal assistance until her detention in January 2010. For that reason, she did not refer directly to the provisions of the Convention in her applications, although the issue of gender-based violence was raised during the processing of the case. No further details are provided in her submission.

2.4 The author claims to have exhausted all domestic remedies because the decision of the Danish Immigration Service is final and not subject to further appeal, either to the Refugee Appeals Board or to a court. According to her, she remains in detention in a camp as a rejected asylum seeker, awaiting her forced deportation.

Complaint

3.1 The author claims that her deportation to China would constitute a violation of her rights under articles 1 to 3, 12 and 15 of the Convention, read in conjunction with the Committee's general recommendation No. 19.

3.2 The author contends that, because her application for asylum was denied, without the right to appeal, as manifestly unfounded, she was discriminated against as a woman, given that she was denied access to justice on an equal basis with men. She specifies that female asylum seekers are not allowed to have a fair trial with the assistance of legal counsel and have a restricted right to appeal compared with male asylum seekers. She is of the position that it appears to be a gender-biased practice to regard the problems of single female asylum seekers as unsubstantiated and manifestly unfounded. She therefore argues that the Danish legal system is lacking gender sensitivity, as demonstrated by the fact that relatively more single female asylum seekers are denied asylum under the manifestly unfounded procedure and deported, without the right to appeal, than male asylum seekers. Thus, the author

[1] See CEDAW/C/CHN/CO/6, paras. 20-22.

claims that her rights under articles 1 to 3 and 15 of the Convention were violated by the State party.

3.3 The author further submits that, by rejecting her asylum request, the State party has failed to protect her and, in particular, to take all appropriate measures to eliminate discrimination against women by any person, to guarantee her the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men and to protect her from violence that would put her health and her life at risk, in violation of articles 1 to 3 and 12 of the Convention.

3.4 The author indicates that she was subjected to violence, forced prostitution and physical abuse because she is a woman. She refers to the Committee's general recommendation No. 19, according to which gender-based violence falls within the scope of the Convention. She claims that, because the Convention applies to all women on the territory of the State party, it also applies to women from third countries seeking asylum. She considers that the State party has an obligation to protect such women against discrimination in their countries of origin and to grant them permission to stay whenever necessary. She also refers to the Committee's conclusion that article 4 (2) of the Convention provides for a positive obligation on States parties to provide effective protection with regard to the right to security of person.[2]

3.5 The author also recalls that both article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 7 of the International Covenant on Civil and Political Rights have an extraterritorial effect. Consequently, she requests the Committee to issue views establishing whether there is a positive extraterritorial obligation on the State party to provide women with effective protection of their right to security of person and, more specifically, whether deportation to rape and forced prostitution may amount to a violation of the Convention.

State party's observations on admissibility

4.1 On 13 May 2013, the State party submitted its observations on admissibility. It submits that the author entered Denmark in November 2008 and was arrested on 1 January 2010 and charged with having illegally stayed in the country since 2008. It also submits that the author left China because she feared that she would be killed by individuals involved in organized crime, given that her former husband had raised a large gambling debt in her name. It further submits that, on 2 January 2010, the Danish Immigration Service decided to expel her from the country pursuant to sections 53b and 34 of the Aliens Act. On 3 January 2010, the Copenhagen City Court decided that the author should be detained until 15 January 2010. During the hearing, the author's counsel stated that the author was requesting asylum in Denmark. The author was released on 12 January 2010 and on 11 February 2010 submitted an asylum application in which she claimed that she feared for her life if she were returned to China. In an interview conducted by the Danish Immigration Service on 29 April 2010, the author stated that she was being sought by loan sharks who had threatened her, raped her, burned her with hot oil and forced her to work as a prostitute. She also stated that she had no family in China and that she could not earn a living owing to her lack of education.

[2] See communication No. 2/2003, *A.T. v. Hungary*, views adopted on 26 January 2005, para. 9.3.

4.2 The State party submits that, on 18 May 2010, the Danish Immigration Service transmitted the author's application for asylum to the Danish Refugee Council under section 53b (2) of the Aliens Act, given that it considered the application manifestly unfounded. On 26 May 2010, the Council endorsed that opinion and found that the return of the author to China would not be contrary to section 31 of the Act. In a decision dated 31 May 2010, the Danish Immigration Service rejected the author's asylum application, stating that her conflict with organized crime elements could not justify asylum because the acts against her were criminal offences without relevance to asylum law and because she could seek protection from the Chinese authorities. It emphasized that, according to its findings, the author had never been a member of any political party or had any conflict with the Chinese authorities. Consequently, it considered the application manifestly unfounded and decided that the author would be returned to China if she refused to leave voluntarily.

4.3 The State party provides detailed information about the legal basis for the decisions made under the Aliens Act. Pursuant to sections 7 and 31 of the Act, an alien will be issued a residence permit in Denmark if he or she is at risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment if returned to his or her country of origin or to a country where he or she will not be protected against such risk (non-refoulement). The above provisions apply to all aliens and must be applied in accordance with the international legal obligations of Denmark. Decisions under section 7 of the Act are made by the Danish Immigration Service and are normally subject to appeal before the Refugee Appeals Board, unless the application is considered manifestly unfounded. Under section 53b (1) of the Act, an application is considered manifestly unfounded if it falls under the criteria established in subparagraphs (i) to (vi), in particular if it is manifest that the circumstances invoked by the applicant cannot lead to the issuance of a residence permit under section 7. In case of a negative decision, the Danish Immigration Service submits the case to the Danish Refugee Council, which can agree with the decision and return the case to the Danish Immigration Service, or it can disagree with the decision, in which case the decision is automatically appealed before the Danish Refugee Board.

4.4 The State party submits that the communication should be declared inadmissible under article 4 (1) of the Optional Protocol because the author did not exhaust all domestic remedies. It observes that, by virtue of article 63 of the Constitution, aliens may bring an appeal before the ordinary courts, which are empowered to decide any question relating to the scope of the executive's authority. It therefore considers that the author is incorrect in stating that she was barred from appealing against the decision in her case. The State party further observes in that connection that the courts are not barred from allowing legal proceedings on the validity of an administrative decision to stay the execution of such a decision. Furthermore, it submits that the decision as to whether legal proceedings should stay the execution of a decision depends on the balance between the public interest in not postponing the execution of the decision and the nature and scope of the harm that may be caused to the individual applicant, while taking into account whether, on the basis of a provisional assessment, there is a reasonable basis for the claim of invalidity. Accordingly, the State party considers that the author had access to an effective remedy in her case. Furthermore, the State party submits that it follows from the case law of the Committee that the author must have raised, at the domestic

level, the substance of the claim that she wishes to bring before the Committee.[3] It observes that no allegation of gender-based discrimination was ever made by the author before the Danish authorities and that the national authorities have accordingly had no opportunity to assess the allegation. It maintains that the author must have at least raised the relevant substantive rights of the Convention before the national authorities for the communication to be declared admissible.

4.5 The State party further submits that the communication should also be declared inadmissible under article 4 (2) (c) of the Optional Protocol, given that it considers that the claim of alleged discrimination against female asylum seekers in Denmark is clearly not sufficiently substantiated.

4.6 The State party further submits that the communication should be declared inadmissible *ratione materiae* and *ratione loci* under article 4 (2) of the Optional Protocol, given that it considers that Denmark is not responsible under the Convention for the acts of gender-based violence suffered by the author, which means that returning the author to China cannot engage the responsibility of the State party. The State party notes that the author seeks to apply the obligations under the Convention in an extraterritorial manner. It considers, however, that the author's allegations of a violation of a right under the Convention mainly relate to China and not to Denmark. Consequently, the State party is of the view that the Committee lacks jurisdiction over the relevant violation in respect of Denmark and that the communication is incompatible with the provisions of the Convention. The State party observes that article 2 of the Optional Protocol provides that communications to the Committee may be submitted by or on behalf of victims of a violation by the State party of any of the rights set forth in the Convention and that, accordingly, it considers that the right of individual petition is limited by a jurisdiction clause. The State party is therefore of the view that the author may submit a communication against Denmark only concerning alleged violations committed by and under the jurisdiction of the State party. It notes that the author's allegations of gender-based violence do not relate to acts carried out by Danish officials or private persons under the jurisdiction of Denmark, but in fact rest on consequences that she may allegedly suffer if returned to China. It insists that the decision to return the author to China cannot engage its responsibility under article 1 to 3, 12 or 15 of the Convention. The State party further observes that the concept of "jurisdiction" for the purpose of article 2 of the Optional Protocol must be considered to reflect the meaning of the term in public international law, meaning that a State party's jurisdictional competence is primarily territorial. It considers that the extent to which acts of States parties that may have an indirect effect on a person's rights under the Convention in other States can entail any responsibility of the acting State party at all will have to be considered an exception based on exceptional circumstances. It submits that no such circumstances exist in the present case that may justify holding Denmark responsible for violations of the Convention expected to be committed by another State party outside Danish territory and jurisdiction. The State party considers that no jurisprudence indicates that the relevant provisions of the Convention have extraterritorial effect.

[3] The State party refers to communication No. 8/2005, *Kayhan v. Turkey*, decision of inadmissibility adopted on 27 January 2006, para. 7.7; the Committee declared the communication inadmissible because the author had not raised sex discrimination as an issue.

4.7 The State party considers that guidance can be found in the case law of the European Court of Human Rights, which has applied[4] extraterritorial effect in relation to article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), a peremptory norm relating to torture and non-refoulement, but has declined to apply the extraterritorial effect of the European Convention on Human Rights in cases under other provisions of that instrument, arguing that, on a purely pragmatic basis, it cannot be required that an expelling State return an alien only to a country that is in full compliance with and fully and effectively enforcing all human rights. The State party further refers to the jurisprudence of the Committee and the Human Rights Committee and submits that the latter has never considered a complaint on its merits regarding the deportation of a person who feared a violation of a "lesser" right or a derogable right by the receiving State. The State party also specifically refers to the relevant provisions of the Convention against Torture and articles 6 and 7 of the International Covenant on Civil and Political Rights, stating that those provisions have been interpreted as offering implicit protection against removal to the death penalty and to torture or other similarly serious threats to the life and security of the person, while specifying that it does not consider that the Convention on the Elimination of All Forms of Discrimination against Women deals directly (or indirectly) with removal to torture or other serious threats to the life and security of the person.

4.8 The State party submits that it is aware that the Committee has emphasized in its general recommendation No. 19 that gender-based violence is a form of discrimination that can impair or nullify the enjoyment by women of human rights and fundamental freedoms, such as the right to life, the right to security of the person and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Nevertheless, it considers that that does not change the fact that a State party is responsible only for obligations vis-à-vis individuals under its jurisdiction and cannot be held responsible for discrimination under the jurisdiction of another State, even if the author can establish that she would be subjected to discrimination contrary to the Convention owing to gender-based violence in China. The State party refers to two recent decisions of the Committee in which this particular challenge to admissibility was not considered,[5] both decisions being declared inadmissible for other reasons. The State party therefore agrees with the author that it would be preferable if the Committee were to express its opinion on the issue of the extraterritoriality of the Convention. The State party notes, however, that the returning of women who arrive in Denmark simply to escape from discriminatory treatment in their own country, however objectionable that treatment may seem, cannot constitute a violation of the Convention by Denmark. The State party contends that, were the opposite view accepted, the consequences would be that States parties could return aliens only to countries where the conditions were in full and effective accord with each of the safeguards of the rights set out in the Convention, a position that it deems to be unacceptable.

[4] The State party refers to the judgement of 7 July 1989 of the European Court of Human Rights in *Soering v. the United Kingdom* (application No. 14038/88).

[5] The State party refers to communication No. 25/2010, *M.P.M. v. Canada*, decision of inadmissibility adopted on 24 February 2012, and communication No. 26/2010, *Herrera Rivera v. Canada*, decision of inadmissibility adopted on 18 October 2011.

4.9 The State party further submits that, in her communication to the Committee, the author has neither clearly identified nor explained the rights under the Convention on which she is in fact relying, but rather simply referred to articles 1 to 3, 12 and 15 of the Convention. For that reason, the State party argues that the communication should also be declared inadmissible under article 4 (2) (c) of the Optional Protocol as not sufficiently substantiated.

Author's comments on State party's observations

5.1 On 22 July 2013, the author provided new information about additional violations of the Convention by the State party and commented on the State party's observations on admissibility.

5.2 The author recalls that she was arrested in October 2012 and was detained pending forced deportation. On 26 February 2013, the City Court extended her detention, notwithstanding her counsel's objection because she had been detained for more than five months and never received any treatment for the implications of her trauma. On 27 February 2013, the author appealed to the High Court of Eastern Denmark, arguing that it would be a violation of the Convention and/or the Convention against Torture to keep her in detention in such conditions. On 4 March 2013, the Eastern High Court upheld the decision of the City Court. The author then appealed to the Supreme Court, which rejected her appeal on 5 April 2013. The author therefore contends that all domestic remedies have been exhausted with regard to her suffering during the detention period.

5.3 The author submits that, as a victim of gender-based violence, her detention in a Danish prison for several months without access to treatment for the implications of her trauma amounts to an additional violation of the Convention by the State party. She considers that States parties to the Convention must provide effective remedies with due diligence to victims of gender-based violence, in addition to access to treatment and reparation. She concedes that, because the acts of gender-based violence were committed in China, the Danish authorities would be able to prosecute them only if the attackers were to enter Danish territory. At the same time, however, she contends that the duty to provide reparation is the opposite of what the Danish authorities have been doing. The author submits that the issue was not raised before the Committee in her initial communication because she had not yet exhausted domestic remedies, but that, now that the Supreme Court has rejected her appeal, the new claim should be added to the communication. She considers that, because these are decisions with regard to her treatment in Denmark, such issues cannot be excluded as inadmissible even if the State party's argument that the Convention has no extraterritorial effect is upheld by the Committee.

5.4 The author observes that the State party's observations were limited to the issue of admissibility and that no comment was made on the merits of the case. Nevertheless, she notes that the State party makes mention of the "facts of the case" with reference to the findings of the Danish Immigration Service that her conflict with organized crime elements in China could not justify granting her asylum, given that the acts against her were criminal offences without relevance to asylum law.

5.5 The author agrees with the State party that asylum cases should be subject to appeal to the national courts, but submits that that is not the case and that the constitutional right to appeal against a judgement does not apply to asylum seekers, given that, in her view, decisions of the Danish Refugee Board may not be appealed

before the courts. She contends that that is also the case for an asylum seeker whose case has been rejected as manifestly unfounded. Furthermore, she submits that there is no precedent and no legal literature to support the opinion that it could be possible for an asylum seeker to appeal against a decision issued under the "manifestly unfounded" procedure before the Danish courts. The author further contests the statement that the Danish courts have the real and effective ability to stay a deportation order and maintains that, according to current jurisprudence, courts can stay a deportation order only in exceptional circumstances. She is therefore challenging the State party's observation that there is a real and effective remedy available for asylum seekers in her position.

5.6 The author concedes that it is correct that she did not mention the relevant provisions of the Convention, but maintains that she did describe gender-based violence in the form of rape and forced prostitution. In addition, because her case was declared manifestly unfounded, she was not allowed access to counsel who would have been able to invoke the relevant provisions. For that reason, the author considers that the reference to communication No. 8/2005 is irrelevant, given that the author in that case had counsel who could have raised the issue appropriately. The author maintains that she was interviewed by the Danish Immigration Service on 29 April 2010 without the assistance of counsel; therefore, the requirement that she mention the relevant provisions of the Convention for the communication to be declared admissible is unacceptable. She argues that it was incumbent on the Danish authorities to identify that the acts of gender-based violence that she suffered were related to the Convention and to treat her asylum application accordingly. She further submits that her case is similar to those concerning victims of trafficking and should have been handled accordingly. She therefore considers that her communication is in line with the requirements of the Optional Protocol and should be declared admissible.

5.7 The author notes that the State party argues that her reference to a similar case before the Human Rights Committee is not proof of discrimination against female asylum seekers. She explains that she mentioned the case because it also concerned a female asylum seeker who suffered from a lack of equal treatment with men in a similar situation. The author elaborates that that case was also considered manifestly unfounded and that it was only after the communication was forwarded to the Human Rights Committee that the Danish authorities reopened the case, provided counsel and allowed the case to proceed to the Refugee Appeals Board, which eventually granted asylum. In her opinion, that demonstrates very clearly the importance of the rights to appeal against judgements and to legal counsel.

5.8 The author concedes that, from a statistical point of view, a single case cannot be considered proof of gender discrimination. She refers to a number of other cases as further evidence of her claim, however. She observes that communications Nos. 33/2011, *M.N.N. v. Denmark*, and 40/2012, *M.S. v. Denmark*, were initially treated as manifestly unfounded asylum cases, indicating that gender-specific issues are treated less seriously than "male issues" such as political repression. Furthermore, she submits that only the Danish authorities would be able to provide gender-disaggregated data on the number of asylum seekers whose claims are rejected under the "manifestly unfounded" procedure.

5.9 The author contends that it is disturbing that more women asylum seekers have their asylum requests denied than male asylum seekers with a similar asylum

motive, referring to several cases of male asylum seekers represented by her counsel. Consequently, she argues that she was discriminated against as a woman with regard to her right to a fair trial and effective legal remedies compared with male asylum seekers in a similar situation. She therefore considers that the communication is sufficiently substantiated and should be declared admissible.

State party's further observations on admissibility

6.1 On 13 September 2013, the State party submitted further observations on admissibility.

6.2 The State party again observes that the author seeks to apply the obligations under the Convention in an extraterritorial manner. It recalls that, in its decision regarding communication No. 33/2011, *M.N.N. v. Denmark*, the Committee made some general comments concerning the extraterritorial effect of the Convention. In paragraphs 8.7 and 8.8, the Committee referred to the principle of non-refoulement and to the statement in general recommendation No. 19 that gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under other human rights conventions, is discrimination within the meaning of article 1 of the Convention. The State party draws attention to the statement made by the Committee in paragraph 8.10 regarding the positive duties of States parties under article 2 (d) of the Convention. In that paragraph, the Committee recalls that, under article 2 (d), States are under an obligation to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party: if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Convention will be violated in another jurisdiction, the State party itself may be in violation of the Convention. In the light of that decision, the State party draws the conclusion that the Convention has extraterritorial effect only when the woman being returned will be exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, with the additional requirement that the necessary and foreseeable consequence is that the individual's rights under the Convention will be violated in another jurisdiction. The State party submits that, in its view, this means that acts of States parties that may have an indirect effect on a person's rights under the Convention in other States can entail responsibility for the acting State party (extraterritorial effect) only under the circumstances in which the person to be returned is at risk of being deprived of the right to life or of being exposed to torture or other cruel, inhuman or degrading treatment.

6.3 The State party recalls that the author alleges that she was raped, burned with hot oil and forced to work as a prostitute by criminals in China. It contends, however, that her allegations are in no way substantiated by any prima facie evidence. In the State party's view, the author has failed to sufficiently substantiate her claim that her removal to China would expose her to a real, personal and foreseeable risk of serious gender-based violence.

6.4 The State party further submits that the author's allegations are equally inadmissible because they are incompatible with article 4 (2) (b) of the Optional Protocol. It contends that positive duties under article 2 (d) of the Convention do not encompass an obligation for States parties to refrain from expelling a person who

may risk pain or suffering inflicted by a private person, without the consent or acquiescence of the relevant State. The State party considers that that limitation was established by the Committee against Torture when it reached the conclusion that the issue of whether a State party has an obligation to refrain from such expulsion fell outside the scope of article 3 of the Convention against Torture.[6]

6.5 The State party refers to the case law of the European Court of Human Rights on article 3 of the European Convention on Human Rights, considering that, when returning aliens, a State party can become responsible for acts committed against the alien in his or her country of origin only if the alien is able to show that the authorities of the receiving State are unable to obviate the risk by providing appropriate protection.[7]

6.6 The State party further submits that the author refers to the concluding comments of the Committee regarding the general situation in China. Those comments date back to August 2006, however, and do not describe the current conditions. Furthermore, the author has provided no prima facie evidence indicating that the Chinese authorities are unable to provide her with appropriate protection. The State party recalls that, in her interview with the Danish Immigration Service on 29 April 2010, the author explicitly stated that she had never contacted the police or any other Chinese authority to seek help.

6.7 The State party therefore argues that, for the reasons explained in paragraphs 4.1 to 4.6 above, the communication should be declared inadmissible. Furthermore, referring to rule 66 of the Committee's rules of procedure, the State party requests that the Committee examine the admissibility of the communication separately from the merits.

Further submissions by the author

7.1 On 18 November 2013, the author submits that she disagrees with the statement by the State party that her allegations are in no way substantiated by any prima facie evidence. She recalls that she informed the Danish authorities that her attackers had threatened her, raped her, burned her with hot oil and demanded that she should work as a prostitute. She further recalls that the Danish Immigration Service told her that, even if it were to accept her statements about her conflict with loan sharks, such conflict could not justify granting her asylum. She is therefore of the view that the Danish Immigration Service has admitted that the events are factual, even though the State party considers them irrelevant and not sufficient to justify granting asylum. The author insists that her suffering is factual and not merely an allegation, highlighting that the word "alleged" is associated with something that is doubtful. She contends that the word "alleged" is either being misunderstood or misused by the State party.

7.2 The author further submits that there is no doubt that she has substantiated that, were she returned to China, she would be exposed to a real, personal and

[6] See Committee against Torture, communications Nos. 130/1999 and 131/1999, *V.X.N. and H.N. v. Sweden*, views adopted on 15 May 2000, para. 13.8.

[7] See European Court of Human Rights, *H.L.R. v. France*, judgement of 29 April 1997 (application No. 24573/94), para. 40; *Salah Sheekh v. the Netherlands*, judgement of 11 January 2007 (application No. 1948/04), para. 137; and *N.A. v. the United Kingdom*, judgement of 17 July 2008 (application No. 25904/07), para. 40.

foreseeable risk of serious forms of gender-based violence, given that she has already previously suffered such violence. She contends that she has provided prima facie evidence through her own statements and by showing her head, which still bears the marks of burns from hot oil. She therefore considers that the communication cannot be declared inadmissible for that reason.

7.3 The author contends that her claim that the Chinese authorities are unable to obviate the risk that she is facing by providing appropriate protection is sufficiently substantiated to declare her communication admissible, given that the information that she provided is highly relevant to the situation that she was facing in China when she was attacked and thus relevant to her decision not to contact the Chinese police. Furthermore, she submits that she has never claimed that the information from the concluding observations of the Committee in 2006 would in any way be relevant to the present-day conditions — on the contrary, she fears that the situation may be much worse today. The author submits, however, that that consideration would be part of the examination of the merits of the case and that she would be happy to provide such information when the case reaches that stage. She argues that at the time of submitting her comments she had every reason not to attempt to contact the police in China and to seek protection elsewhere. She further notes that the male asylum seekers mentioned above were permitted to file an appeal, even though they had never requested the Chinese police to protect them against loan sharks. Consequently, she considers that the communication is compatible with the provisions of the Convention and should be declared admissible.

7.4 On 2 January 2014, the author added that her counsel had again represented a male Chinese asylum seeker before the Danish Refugee Board, a man who feared violence because he had borrowed money from loan sharks. The man's claim had been rejected, but some of the Board members had stated that they would grant asylum on the basis that the asylum seeker had left China illegally. According to the author, this fact demonstrates that she was discriminated against with regard to the right to access to justice compared with men. She further submits that, had she been allowed to file an appeal on an equal footing, she might also have argued that she feared persecution from the Chinese authorities owing to her illegal exit from the country. While that argument may or may not have led to asylum being granted, the author maintains that her right to equal treatment has been violated, given that a greater number of men in a similar situation have been granted leave to appeal. Consequently, she has been discriminated against as a woman because she was not even permitted leave to appeal, unlike male applicants who feared persecution from loan sharks. She also adds that she sees no attempt to answer her comments on the issue in the State party's observations.

7.5 The author further submits that in 2013 her counsel represented five Chinese men whose asylum applications were rejected by the Danish Immigration Service and who were granted leave to appeal. She argues that she has been discriminated against as a woman with regard to her right to a fair trial and effective legal remedies compared with male asylum seekers in the same situation. She therefore considers that her communication is sufficiently substantiated and should be declared admissible under article 4 (2) of the Optional Protocol.

Issues and proceedings before the Committee concerning admissibility

8.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol.

8.2 The Committee takes note of the author's claims that her deportation to China would constitute a violation by Denmark of articles 1 to 3, 12 and 15 of the Convention. The Committee also takes note of the State party's argument that the communication should be declared inadmissible *ratione loci* and *ratione materiae* under article 2 of the Optional Protocol, given that Denmark has obligations under the Convention only vis-à-vis individuals under its jurisdiction and cannot be held responsible for violations of the Convention, such as gender-based violence, expected to be committed by another State outside the Danish territory and jurisdiction. The Committee further takes note of the State party's reference to the concept of jurisdiction in public international law, in addition to its contention that the Convention lacks extraterritorial effect and that, unlike other human rights treaties, does not deal, directly or indirectly, with removal to torture or other serious threats to life and the security of a person.

8.3 The first issue that needs to be addressed by the Committee is whether it is competent under the Convention to consider the present communication, involving the deportation of the author from Denmark to China, where she claims she would be exposed to gender-based violence, a treatment prohibited by the Convention. The Committee would need to determine whether, by deporting the author to China, the State party's responsibility would be engaged under the Convention for the consequences of such deportation, albeit outside its territory.

8.4 The Committee recalls that in paragraph 12 of its general recommendation No. 28 on the core obligations of States parties under article 2 of the Convention it emphasized that the obligations of States parties applied without discrimination both to citizens and non-citizens, including refugees, asylum seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory. The Committee indicated that States parties were responsible for all their actions affecting human rights, regardless of whether the affected persons were in their territories.

8.5 The Committee recalls that article 1 of the Convention defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. The Committee further recalls its general recommendation No. 19, which has clearly placed violence against women within the ambit of discrimination against women by stating that gender-based violence is a form of discrimination against women and includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. With regard to the State party's argument that, unlike other human rights treaties, the Convention does not deal, directly or indirectly, with removal to torture or other serious threats to the life and the security of a person, the Committee recalls that, in the same recommendation, it also determined that such gender-based violence impaired or nullified the enjoyment by women of a number of human rights and fundamental freedoms, which include the right to life, the right not to be subjected to torture or to cruel, inhuman, degrading

treatment or punishment, the right to liberty and security of the person and the right to equal protection under the law.

8.6 The Committee further notes that, under international human rights law, the principle of non-refoulement imposes a duty on States to refrain from returning a person to a jurisdiction in which he or she may face serious violations of human rights, notably arbitrary deprivation of life or torture or other cruel, inhuman or degrading treatment or punishment. The principle of non-refoulement also constitutes an essential component of asylum and international refugee protection.[8] The essence of the principle is that a State may not oblige a person to return to a territory in which he or she may be exposed to persecution, including gender-related forms and grounds of persecution. Gender-related forms of persecution are forms of persecution that are directed against a woman because she is a woman or that affect women disproportionately.

8.7 As to the State party's argument that nothing in the Committee's jurisprudence indicates that any provisions of the Convention have extraterritorial effect, the Committee recalls that, under article 2 (d) of the Convention, States parties undertake to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation. This positive duty encompasses the obligation of States parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party: if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Convention will be violated in another jurisdiction, the State party itself may be in violation of the Convention. For example, a State party would itself be in violation of the Convention if it sent back a person to another State in circumstances in which it was foreseeable that serious gender-based violence would occur. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later. What amounts to serious forms of gender-based violence will depend on the circumstances of each case and would need to be determined by the Committee on a case-by-case basis at the merits stage, provided that the author had made a prima facie case before the Committee by sufficiently substantiating such allegations.[9]

8.8 The Committee takes note of the author's claim that she fears being subjected to gender-based violence by organized crime elements if she is returned to China and that the Chinese authorities will not protect her against such acts. The Committee also notes that the State party's authorities rejected her claim that they would be unwilling or unable to protect her from attacks by loan sharks, taking into consideration that she never attempted to seek any kind of protection while in China. The Committee observes that, while the author disagrees with the factual conclusions of the State party's authorities, she has never attempted to seek protection from the Chinese authorities and has presented no prima facie evidence

[8] See article 33 (prohibition of expulsion or return ("refoulement") of the 1951 Convention relating to the Status of Refugees.

[9] See communication No. 33/2011, *M.N.N. v. Denmark*, decision of inadmissibility adopted on 15 July 2013 (i.e. after the registration of the present communication), para. 8.10.

that they were or would have been unable or unwilling to provide her with protection against the organized crime elements.

8.9 The Committee further takes note of the author's claim that she is a victim of gender-based discrimination with regard to the right to access to justice, given that more female asylum seekers than male asylum seekers are denied asylum under the "manifestly unfounded" procedure by the State party's authorities. The Committee also takes note of the author's claim that, as a victim of gender-based violence, her detention in a Danish prison for several months without access to treatment for the trauma that she suffered amounts to a violation of the Convention by the State party and that the State party has a duty to provide effective remedies with due diligence to victims of gender-based violence, as well as access to adequate treatment and reparations. The Committee recalls that, as stated in its general recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, articles 1 to 3, 5 (a) and 15 of the Convention establish an obligation upon States parties to ensure that women are not discriminated against during the entire asylum process, beginning from the moment of arrival at the borders. Women asylum seekers are entitled to have their rights under the Convention respected; they are entitled to be treated in a non-discriminatory manner and with respect and dignity at all times during the asylum procedure (para. 24). The Committee also recalls that a gender-sensitive approach should be applied at every stage of the asylum process and that women asylum seekers whose asylum applications are denied should be granted dignified and non-discriminatory return processes (paras. 24-25). Lastly, the Committee notes that the author, who is represented by counsel, has not informed it of her whereabouts and whether she has been deported to China. In the above circumstances and in the absence of any other pertinent information on file, the Committee considers that the author has not substantiated her claim of gender-based discrimination in terms of access to justice and that she has also failed to sufficiently substantiate, for purposes of admissibility, the claim that her removal from Denmark to China would expose her to a real, personal and foreseeable risk of serious form of gender-based violence. The Committee notes that, under article 4 (2) (c) of the Optional Protocol, it must declare a communication inadmissible where it is not sufficiently substantiated. Accordingly, the Committee concludes that the present communication is inadmissible under article 4 (2) (c) of the Optional Protocol.

9. The Committee therefore decides:

(a) That the communication is inadmissible under article 4 (2) (c) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.